2000

Peter Ennenga v. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

In the Matter of the Discipline of:	)	**REPLY BRIEF**
PETER ENNENGA, #0999	)	Appellate No. 20000476-SC
Respondent	)	Priority No. 5

Appeal From the Third District Court, Salt Lake County,
Judge Stephen Henriod

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ARGUMENT IN RESPONSE TO ENNENGA'S ISSUE ON CROSS APPEAL

I. The District Court Correctly Rejected Ennenga's Claim to Protection From Rules Promulgated Ex Post Facto to His Misconduct

Ennenga erroneously contends that the application of the Rules of Lawyer Discipline and Disability ("RLDD") and the Standards for Imposing Lawyer Sanctions ("Standards") as this Court directed in In re Babilis "is inequitable to Mr. Ennenga since the enactment, and application of the new standard, all occurred after his misconduct," and "[b]y utilizing post 1993 disciplinary standards, the Bar is violating his constitutional right to be protected against ex post facto application of the new Rules." Reply and Cross Appeal Brief of Appellee/Cross Appellant ("Appellee's Brief") at 30, 37. Ennenga is mistaken for the reasons set forth below.

A. Well-Settled Law From Throughout the Country Establishes That Ex Post Facto Protections Do Not Apply in Disciplinary Proceedings

Courts in jurisdictions throughout the country reject Ennenga's contention that the application of the Standards violates his constitutional right to protection from penalties more severe than those in force when he misappropriated Wilson's money. The decisions from these courts rest upon the premise that discipline proceedings are civil in nature, and their aim is the protection of the public and the profession, not the punishment of the respondent. Consequently, some of the constitutional safeguards applicable in criminal proceedings do not afford similar protections in the context of professional discipline.

The following is a sample of what courts elsewhere have had to say about the general principle that ex post facto protections do not apply in disciplinary proceedings:

> Petitioner erroneously seeks to apply criminal law principles to this case. The primary purpose of attorney disciplinary matters is to protect the public, bench, and bar, not to punish the attorney. . . . In keeping with this principle, we recently noted that there is no constitutional impediment to applying these standards to conduct predating their January 1, 1986, 'effective' date. *The ex post facto clauses of the federal and state Constitutions do not apply, because petitioner is not being 'punished' under a penal statute.*

In re Gary, 749 P.2d 1336, 1340 (Cal. 1988) (citations omitted; emphasis added). The Supreme Court of Illinois explained the underlying reasons thus:

> The prohibition against ex post facto laws guards against any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' . . . *Ex post facto clauses apply only to laws which are criminal or penal in nature. Illinois disciplinary proceedings are neither criminal nor penal in nature.* . . . As this court has stated: 'The first purpose of a proceeding to discipline a member of the bar is to protect members of the public, to maintain the integrity of the legal profession and to safeguard the administration of justice from reproach.' 'Punishment is not the object. The object of such an inquiry is to determine whether the attorney is a proper person to be permitted to practice his profession.' . . . Therefore, ex post facto clauses do not apply to disciplinary proceedings.

In re Bell, 588 N.E.2d 1093, 1101 (Ill. 1992) (citations omitted; emphasis added). The Supreme Court of Arizona agrees: "Bar and judicial discipline proceedings are neither penal in objective nor criminal in nature, and discipline may be imposed in manners that would be constitutionally impermissible in a criminal case." In re Hoover, 779 P.2d 1268, 1272 (Ariz. 1989) (citations omitted; emphasis added).

Utah's rules and the cases interpreting them consistently state that disciplinary proceedings are civil in nature, not punitive, and serve the goal of protecting the public and the profession. The Standards provide that "[t]he purpose of imposing lawyer sanctions is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers, and to

protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or likely to be unable to discharge properly their professional responsibilities." Rule 1.1, Standards; see also Rule 1(a), RLDD (using nearly identical language to describe the purpose of lawyer disciplinary and disability proceedings). The RLDD provide that "Formal disciplinary and disability proceedings are civil in nature." Rule 1(b), RLDD. The Court has reiterated these principles most recently in Babilis, but in other cases as well. See In re Babilis, 951 P.2d 207, 215 (Utah 1997) (attorney discipline neither punitive nor criminal punishment); In re Badger, 493 P.2d 1273, 1275 (Utah 1972) (disbarment's purpose to protect public, not punish attorney). Indeed, the Court has addressed the issue in the context of deciding whether the constitutional protection against double jeopardy applies in attorney discipline cases.[1] See In re McCune, 717 P.2d 701, 707 (Utah 1986). The Court stated that the respondent's claim to protection from double jeopardy "is groundless because double jeopardy principles apply only in criminal cases. Bar proceedings are civil in nature. Their aim is to maintain the honesty, integrity and professionalism of the Bar." Id.

Some courts have elaborated on the underlying reasons for the distinction. As the Supreme Court of Louisiana said,

> It is a well-settled principle of construction, which is established by a long line of cases, that the constitutional prohibition against the passage of ex post facto laws applies only to penal or criminal matters. Laws which affect only civil rights or which regulate civil remedies are not within the rule which prohibits the passage of ex post facto laws.

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[1] Ennenga's counsel, who was also counsel in Babilis, contended that Babilis was analogous to a criminal case for purposes of a double jeopardy analysis. See In re Babilis, 951 P.2d at 214. The Court stated, "The revised disciplinary rules state that disciplinary adjudications are civil proceedings, see Rule 1(c), and we see no basis for concluding otherwise." Id.

But a proceeding for the disbarment of an attorney is not a criminal proceeding, since the purpose thereof is not to punish the attorney but to preserve the courts of justice from the official ministration of persons unfit to practice in them. . . . And, where the purpose of a statute is to protect the public from unfit persons, it is constitutional, although it disqualifies a person by reason of past acts from continuing in the practice of his profession or from remaining in his business.

In re Craven, 151 So. 625, 626 (La. 1930).

More recently, the West Virginia Supreme Court of Appeals stated:

It is first of all obvious that the constitutional rules relating to ex post facto laws do not apply to the kind of rules such as Rule 24, relating to attorney-disciplinary cases.

The general rule outlining the nature of disbarment proceedings is stated in numerous cases and nowhere more succinctly than in [Corpus Juris Secundum]: . . .

> strictly speaking, such proceedings are neither civil actions nor criminal prosecutions, but are special proceedings, peculiar to themselves, sui generis, disciplinary in nature, and of a summary character, resulting from the inherent power of the courts over their officers, and they usually relate to conduct unbecoming to an attorney after his admission to practice. Such a proceeding is not a lawsuit between parties litigant, but is rather in the nature of an inquest or inquiry as to the conduct of the respondent.
>
> Although the word punishment is frequently used and it cannot be questioned that disbarment is punishment, it is almost universally held that the proceeding is not for the purpose of punishment of the attorney, but to determine the fitness of an officer of the court to continue in that capacity and to preserve and protect the courts of justice and the public from the official ministration of persons unfit to practice.

Inasmuch as attorney disciplinary proceedings are no more civil than criminal, rather sui generis, the rules of civil law relating to retroactivity of statutes are not strictly applicable to such proceedings. *It is clear that rules providing for procedures to be followed in the disciplining of attorneys may be applied retroactively to an offense occurring prior to the enactment of the rule.*

In re Brown, 197 S.E.2d 814, 817-818 (W. Va. 1973) (citations omitted; emphasis added); accord In re Rabideau, 306 N.W.2d 1, 9 (Wis. 1981) ("there is no ex post facto prohibition except in criminal proceedings or matters where penalty or punishment is imposed;" "attorney disciplinary proceedings are neither criminal nor punitive, but instead aimed at regulating the profession and protecting the public.").

B. In Cases Similar to This Case, Courts Elsewhere Have Considered and Rejected Protecting Respondents From the Application of Ex Post Facto Rules

Many courts have addressed precisely the contention Ennenga makes in this case. The District of Columbia Court of Appeals rejected a petitioner's argument that his suspension was protected from ex post facto rules, saying, "the doctrine of ex post facto application of law, to the extent petitioner relies on it, by itself does not pertain to attorney discipline, which is not punitive." In re Stanton, 757 A.2d 87, 89-90 & n.5 (D.C. 2000) (citation omitted); see also In re Addams, 579 A.2d 190, 198 n.19 (D.C. 1990) (rejecting as "meritless" Addams's contention he should not be disbarred because his action occurred prior to the court's decision in a case announcing that disbarment is ordinarily the sanction in misappropriation cases). The Supreme Court of California dismissed such an argument with little comment:

> Petitioner complains that the Standards, effective only on January 1, 1986, were applied to conduct in her case which occurred before that time. However, we have held that nothing akin to an ex post facto problem is presented by application of the Standards to attorney misconduct which occurred before their effective date.

In re Lamb, 776 P.2d 765, 768 (Cal. 1989) (citations omitted).

C. Ennenga's Misconduct Violated Longstanding Rules, and Disbarment Has Long Been a Possible Consequence

The rules governing the professional conduct of lawyers in Utah have long prohibited conduct similar to Ennenga's. See e.g. In re Davis, 754 P.2d 63 (Utah 1988) (attorney disbarred upon conviction for theft of client money); In re Fullmer 405 P.2d 343 (Utah 1965) (attorney suspended for three years for conversion of client money); see also In re Keiler, 380 A.2d 119, 124-125 (D.C. 1977) ("Inasmuch as the law as far back as 1964, at least, has proscribed the same conduct . . . it cannot be argued that the conduct here was innocent when done. We hold that its punishment under the authority transferred to this court by the Congress does not offend the constitutional prohibition against ex post facto laws."); In re Samuels, 535 N.E.2d 808, 814 (Ill. 1989) (because attorneys prohibited from and suspended for such conduct prior to 1980, contention that respondent is being disciplined for conduct proper when it occurred is without merit).

D. Babilis's Announcement of a Bright Line Rule Does Not Foreclose the Possibility of Disbarment for Misappropriations Committed Before Babilis, Nor Do the Changes In Procedure Preclude Their Application to Misconduct Committed Before They Were Implemented

Ennenga contends the bright line rule announced in Babilis applies only to future cases. See e.g. Appellee's Brief at 30 (characterizing Babilis as "a matter of future principle" and a prospective, not retroactive test of conditions for disbarment). The Court of Appeals of the District of Columbia rejected a similar argument:

> We recognize that we did qualify our notice to the bar in Hines by saying that disbarment would 'ordinarily be the sanction' in 'future misappropriation cases.' . . . Nonetheless, we must consider that a sanction imposed pursuant to a disciplinary proceeding is, in effect a judgment of an attorney's fitness to practice his profession, . . . rather than

> a form of punishment for past transgressions. It follows, therefore that the sanctions we impose are not circumscribed by ex post facto restrictions. Consequently, we may properly consider In re Hines, supra, in determining the appropriate sanction for respondent's misconduct—even though his unauthorized use occurred before our decision in Hines. Indeed, Hines did not announce a new rule with exclusive prospectivity. That opinion observed that even as to commingling violations the court in the twelve years past had imposed disbarment as 'the usual sanction' in twenty of twenty-eight such cases. . . . *Hines created no right to be free of the risk of disbarment for misappropriation conduct preceding that decision.*

In re Buckley, 535 A.2d 863, 867 (D.C. 1987) (citations omitted; emphasis added). The OPC urges the Court to reject Ennenga's contention that the Babilis decision forecloses the possibility of disbarment for misappropriations committed before Babilis was published.

Ennenga's arguments urge the conclusion that because the disciplinary procedures changed in 1993, it is somehow unfair to impose them upon him. See e.g. Appellee's Brief at 29. This Court addressed a similar argument in 1933, when it considered whether a respondent could be prosecuted for misconduct committed prior to the creation of the Utah State Bar as the regulatory entity. The Court said:

> Nor is there any merit to the claim made by the accused that the Utah State Bar commission was without jurisdiction to hear the cause upon the stated ground that the Utah State Bar did not exist at the time of the alleged commission of the acts of misconduct. . . . It is elementary law that a newly created method of procedure may be employed in an inquiry into acts of alleged misconduct which occurred prior to the creation of such new procedure.

In re Barclay, 24 P.2d 302, 304 (Utah 1933). The OPC urges the Court to apply the same principles here: the procedural changes implemented in 1993 may be employed in an inquiry into misconduct that occurred prior to their adoption.

E. Ennenga Is Not Entitled to a Lesser Sanction Merely Because Other Respondents Have Avoided Disbarment For Arguably Similar Misconduct

Ennenga suggests that others who have committed similar misconduct have nevertheless received sanctions other than disbarment, and his conduct should not be sanctioned pursuant to the standard articulated in Babilis. See Appellee's Brief at 31-37. This contention is erroneous for two reasons.

First, because attorney discipline matters vary in their individual details, neither perfection nor absolute uniformity can always be achieved. Thus, in response to a respondent's argument that the sanction imposed upon him was too harsh in comparison to other cases, the Supreme Court of Arizona noted that, "we can only say that if [the respondent in the other case] got less than he deserved, we do not propose to make the same mistake twice." In re Wines, 660 P.2d 454, 458 n.5 (Ariz. 1983). Ennenga cannot claim the benefit of leniency merely by virtue of the fact that misappropriation was sometimes sanctioned less stringently: his misconduct warrants disbarment.

Second, what cannot be known from Utah Bar Journal Discipline Corner excerpts Ennenga cited is the extent to which Ennenga's misconduct actually compares with the brief summaries reported there. Ennenga's undocumented comparison of discipline summaries is unhelpful because these cases are factually distinct from the facts in this case. For example, most consent disciplines are reached for reasons not set out in the factually condensed reports, such as missing complainants or witnesses, or mitigating circumstances. Absent more information, a truly meaningful discussion of this argument is impossible.

The Supreme Court of California rejected a similar argument thus:

> We have considered petitioner's argument that we have not always ordered disbarment in cases where an attorney misappropriates clients' funds. Recently we did reject the review department's recommendation of disbarment in a case involving misappropriation of money from a client trust fund. We did so, however, in light of mitigation more compelling than what petitioner has presented: the attorney had a genetic predisposition to alcoholism, had practiced for five years without incident, voluntarily enrolled in drug and alcohol treatment, and of his own volition ceased practicing law and worked at heavy labor until he had undergone rehabilitation. On the facts of this case we conclude that disbarment is appropriate. *Petitioner has not met his burden of proving that the recommendation of the review department is erroneous or unlawful.*

In re Ewaniszyk, 788 P.2d 690, 696 (Cal. 1990) (emphasis added).

Ironically, under the reasoning Ennenga advances, Babilis could not have been disbarred, inasmuch as his misconduct occurred before the changes in the disciplinary structure and the Court's articulation of a bright-line rule. Babilis's disbarment was consistent, however, with prior decisions disciplining attorneys who misappropriated client funds. See In re Schwenke, 865 P.2d 1350 (Utah 1993) (attorney who misappropriated client funds disbarred); In re Davis, 754 P.2d 63 (Utah 1988) (attorney who misappropriated client funds disbarred).

F. The Troubling Implication of Ennenga's Ex Post Facto Argument Is That His Honesty Depends Upon Knowing Whether the Sanction Will Be Severe, Rather Than Upon the Fundamental Duties He Owes His Clients and the Profession

Ennenga's Brief implies that, had he known that the consequence of his misconduct would be disbarment, he might have acted differently. This is troubling, inasmuch as every attorney owes every client absolute honesty and integrity when it comes to handling client money. Such honesty and integrity should never depend upon

the severity of the consequences if the attorney's misconduct is discovered: attorneys must be relied upon to do the right thing for the sake of doing the right thing.

G. The Cases Ennenga Cited In Support of His Cross-Appeal Do Not Support His Contention That Ex Post Facto Protections Apply In Disciplinary Proceedings

Ennenga cited State v. Davis in support of his cross-appeal. See Appellee's Brief at 37-38; State v. Davis, 972 P.2d 388 (Utah 1998). By Ennenga's account, Davis held that in rem property forfeitures were remedial civil sanctions, and not criminal punishment for purposes of double jeopardy analysis. Id. Ennenga noted that the Davis decision cited with approval United States v. Ward, which in turn relied on another United States Supreme Court case, Kennedy v. Mendoza-Martinez. See Davis, 972 P.2d at 390-391; United States v. Ward, 448 U.S. 242 (1980), Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Adopting wholesale a list of criteria that applied in a citizenship forfeiture context, Ennenga argued that the Davis decision might have some impact upon the Babilis decision's statement that attorney discipline is not a criminal penalty. See Appellee's Brief at 38-39. Ennenga's reliance on these cases in support of his contention that disbarment is a criminal penalty is misplaced.

Davis recited the Ward decision as establishing "a test to decide whether a civil penalty constitutes double jeopardy." Davis, 972 P.2d at 391. Double jeopardy is of course not what is at issue here. One of the two elements of the Ward double jeopardy test was "where Congress indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was *so punitive either in purpose or effect* as to negate that intention." Davis, 972 at 391 (emphasis added). As Davis stated, "To determine whether a nominally civil penalty is 'so punitive either in purpose or effect' as

to constitute a criminal penalty, Ward relied upon Mendoza-Martinez." Davis, 972 P.2d at 391. What follows in the Davis decision is the Mendoza-Martinez "non-exclusive list of criteria for determining whether a nominally civil statute actually prescribed a criminal penalty." Davis, 972 P.2d at 391.

Mendoza-Martinez addressed whether automatic forfeiture of citizenship statutes, without prior court or administrative proceedings, are penal in character and consequently deprive people of citizenship without due process of law and without according them constitutional rights such as notice, confrontation, compulsory process, trial by jury, and assistance of counsel. See Mendoza-Martinez, 372 U.S. at 163-164. The United States Supreme Court stated that "The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution." Id. at 168. The Court identified the following factors that must be considered in relation to a statute if, unlike the situation here,[2] there is no conclusive evidence of congressional intent as to the penal nature of the statute:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Mendoza-Martinez, 372 U.S. at 168-169 (footnotes omitted; numerals added).

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[2] The non-criminal nature of these proceedings, as has previously been noted, is explicitly stated in the RLDD. See Rule 1, RLDD.

The OPC considers it unlikely this Court will employ the Mendoza-Martinez criteria to rules the Court itself promulgated. For one thing, Mendoza-Martinez promulgated a list of criteria for determining whether a nominally civil statute enacted by a legislative body in fact prescribes a criminal penalty. These criteria and the test adopted in Ward were used in Davis to review a statute enacted by the Utah State Legislature. By contrast, the rules in issue here were promulgated through this Court pursuant to its own rulemaking process authorized by the Utah Constitution. See Rule 11-101(1)(A), Supreme Court Rules of Professional Practice ("Section 4 provides that the Supreme Court shall by rule govern the practice of law, including . . . the conduct and discipline of persons admitted to practice law."). Having been promulgated by the Court itself, the rules in issue in this case are fundamentally different from the statutes examined in Davis, Ward, or Mendoza-Martinez. For another thing, Mendoza-Martinez and Ward were each decided some time ago—thirty-seven and twenty years, respectively—and yet these decisions have had no impact upon the prevailing perspective in jurisdictions throughout the nation that attorney discipline cases are not criminal or penal proceedings, and instead foster protection of the public and the profession.

Even if the Court considers the Mendoza-Martinez criteria useful for a re-evaluation of its long-held view of the essential nature of attorney discipline proceedings, the result will be the same: attorney disciplinary proceedings are neither penal nor criminal in nature. The following is an analysis of each of the criteria.

As to whether the sanction involves an affirmative disability or restraint [1 above], the answer is mixed. Viewed as a whole in the context of the attorney discipline

system, the sanctions identified in the Standards do not always involve an affirmative restraint. Reprimands and admonitions impose no restraint on practice; suspensions and disbarments do.

As to whether sanctions imposed against attorneys have historically been regarded as a punishment [2 above], Ennenga contends, with no supporting authority, that "[a]ttorney discipline has historically been regarded by the public and the legal profession as punishment, at least when sanctions of suspension or disbarment are imposed." Appellee's Brief at 38. The OPC cannot confirm or refute this statement as to the public, but the clear weight of the authority cited previously in this Brief refutes the assertion with respect to the legal profession.

As to whether the sanction comes into play only on a finding of scienter [3 above], the answer again is mixed. If the Standards are reviewed in their entirety, it is obvious that some types of sanctions are imposed for negligent conduct—reprimands and admonitions. See Rule 4, Standards. But suspensions and disbarments are reserved for knowing conduct. See id.

As to whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence, [4 above], the OPC vigorously disputes Ennenga's claim that his disbarment will promote "retribution" as one of the traditional aims of punishment. Appellee's Brief at 39. Retribution—premised on the notion that every crime demands payment in the form of punishment—simply has no place in these proceedings. Deterrence, concededly, is another matter, for if the imposition of sanctions gives other attorneys pause before engaging in misconduct, then the attorney discipline system is well served.

As to whether the behavior to which it applies is already a crime [5 above], it is once again a factor that has only limited application. As with some of the other factors, it has no application to some of the sanctions available under the Standards. But even if consideration is limited to the sanctions of disbarment and suspension, the factor has limited application, for each of these sanctions may be imposed for non-criminal conduct. Taken to its logical conclusion, if the proposed test were applied in the manner Ennenga suggests in his case, disbarment could be imposed for non-criminal conduct (such as an attorney's abandonment of practice), but not where the underlying conduct was a crime. Such a result would lead to bizarre results: the most severe sanctions would be reserved for arguably less serious misconduct.

As to "whether an alternative purpose to which it may rationally be connected is assignable for it" [6 above], the OPC notes that Ennenga himself addressed this by pointing to the Court's statement in Babilis that withdrawal of the right to practice law is remedial in nature, and attorney discipline therefore is neither punitive nor a criminal penalty. Appellee's Brief at 39. Sanctions are not, however, an "alternative purpose" of the attorney discipline system. The purpose of the attorney discipline system is safeguarding the public and the profession; the sanctions are an important (but not the exclusive) means by which that purpose is furthered.

Finally, as to whether the sanction appears excessive in relation to the alternative purpose assigned [7 above], the answer is no. The sanctions are necessary, and precisely tailored so as to effect their purpose.

Thus, even under the "test" proposed by Ennenga (essentially the application of the Mendoza-Martinez criteria), attorney discipline proceedings are not penal or criminal in nature. They are, as the RLDD state, civil proceedings.

H. Ennenga's Contention That the Rules May Not Be Retroactively Applied Is Similarly Lacking In Merit

Without elaborating on the reasons, or citing any support therefor, Ennenga contends that the Utah Code's provision that "no part of these revised statutes is retroactive, unless expressly so declared," should apply to the adoption of new standards of discipline even though these are not legislative acts. Appellee's Brief at 39-40. For the reasons set forth above,[3] the OPC disagrees, and reiterates a portion of the West Virginia Supreme Court passage quoted above: "Inasmuch as attorney disciplinary proceedings are no more civil than criminal, rather sui generis, the rules of civil law relating to retroactivity of statutes are not strictly applicable to such proceedings. *It is clear that rules providing for procedures to be followed in the disciplining of attorneys may be applied retroactively to an offense occurring prior to the enactment of the rule.* In re Brown, 197 S.E.2d 814, 817-818 (W. Va. 1973) (citations omitted; emphasis added).

ARGUMENT IN REPLY TO ENNENGA'S BRIEF AS TO THE OPC'S APPEAL

II. Disbarment Is the Appropriate Sanction for Ennenga's Misconduct

A. The OPC Did Not "Overlook" the Fact That the District Court Reviewed Recent Disciplinary Cases

Ennenga states that "The Bar claims that 'recent case law' compels a conclusion

of disbarment. The Bar overlooks the fact that the Court reviewed each of those 'recent' cases, and concluded that weighing the misconduct of Mr. Ennenga against the misconduct of the attorneys in the prior cases, 'shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and the time elapsed between misconduct and sanction.'" Appellee's Brief at 20.

This statement is incorrect. Indeed, the OPC repeatedly noted the District Court's comparison of Ennenga's case with the misconduct and aggravating and mitigating circumstances found in the Babilis, Ince, Tanner, and Stubbs cases. See Brief of Appellant at 12, 13, 17, 22, 27, 29-30. Not only does the OPC acknowledge that the District Court made the comparison, its point is that the District Court erred in its application of the cases to Ennenga's case. See e.g. id. at 27, 29-30.

B. District Courts Should Employ the Guidance Given By This Court Concerning the Application of Rule 6's Aggravating and Mitigating Factors

Ennenga asks, "How does a trial court or for that matter, an appellate court decide that there are 'truly compelling mitigating circumstances?'" Appellee's Brief at 24. The answer to that is simple: guidance on the application of the factors identified in Rule 6 of the Standards is to be found in the case law. For circumstances not yet addressed by decisions of this Court, a District Court may look to the decisions of other jurisdictions for interpretive help. The problem here, as the OPC demonstrated in its

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[3] Among other things, Ennenga's contention is without merit because, once again, the statute applies to statutes promulgated by the Legislature, not rules promulgated by this Court.

initial Brief, is that the District Court misapplied several of the mitigating and aggravating circumstances in contravention of clearly established guidance from this Court.

It is perhaps helpful at this point to recall the guidance given in Ince: "[u]sually, adjustments under rule 6 will simply involve more precise tailoring of the presumptive sanction . . . ." Id. Moreover, "[t]o justify a departure from the presumptive level of discipline set forth in the Standards, the aggravating and mitigating factors must be significant." See In re Ince, 957 P.2d at 1237-1238. This is because maintaining public confidence in the Bar "requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions." In re Wilson, 409 A.2d 1153, 1157-1158 (N.J. 1979).

Finally, the OPC notes that because of the "unique nature of attorney discipline proceedings," the Court may draw its own inferences from the trial court's factual determinations, which are reviewed under a clearly erroneous standard. See In re Stubbs, 1999 UT 15, ¶ 19.

CONCLUSION

The OPC recognizes that the District Court found that Ennenga's misappropriation of client money was mitigated by the factors identified in its decision, and that it viewed Ennenga's misconduct as less egregious than the misconduct discussed in recent Supreme Court attorney discipline cases. Nevertheless, the magnitude of Ennenga's misconduct cannot be overlooked, and the mitigating factors fall far short of justifying a sanction other than disbarment—especially when weighed against the aggravating factors given their proper weight. The District Court erred in

failing to disbar Ennenga, and the OPC therefore respectfully asks the Court to reverse its order of suspension and to disbar him.

Additionally, the OPC urges the Court to decline Ennenga's invitation to revisit the issue of whether attorney discipline proceedings are criminal or penal in nature and therefore susceptible to the constitutional protections afforded ex post facto statutes. The well-established law in this jurisdiction and others is that because of their underlying purpose to protect the public, the profession, and the administration of justice, these proceedings are neither criminal nor penal, and the ex post facto analysis therefore is inapposite.

DATED this 19th day of December, 2000.

Kate A. Toomey

KATE A. TOOMEY
Deputy Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2000, I caused to be mailed via United States mail, first class postage pre-paid, two true and correct copies of the foregoing REPLY BRIEF to Brian R. Florence, 5790 Harrison Boulevard, Ogden, Utah 84403.

Kate A. Toomey